

Form 4.

Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appellant or Petitioner, Tanya D. Dennis

C-10-1596-CW

v.

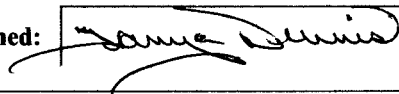
Case No.

Appellee or Respondent, WELLS FARGO/WACHOVIA

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. 28 U.S.C. sec. 1746; 18 U.S.C. sec. 1621.

Signed:



Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date:

2-9-11

My issues on appeal are:

Summary Judgement on Plaintiff although Plaintiff has a forensic loan audit and documents submitted by Cal Western Reconveyance, Substitute Trustee that is evidence that her causes of action can be substantiated by documented proof of fraud, unjust enrichment, illegal foreclosure and misrepresentation occurred. Plaintiff can also show there were numerous breaches in the contract, securitization and quiet title.

FILED

FEB - 9 2011

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the Ninth District

District of Northern California

File Number _____

Tanya D. Dennis, Plaintiff

v.

WELLS FARGO BANK,N.A.

WACHOVIA MORTGAGE,

A division of WELLS FARGO BANK

And, WACHOVIA MORTGAGE, FSB, and,

WORLD SAVINGS BANK, FSB, and,

GOLDEN WEST SAVINGS ASSOCIATION

SERVICE CO, CAL-WESTERN

RECONVEYANCE CORP. and,

JOHN AND JANE DOES 1-5

Notice of Appeal

Notice is hereby given that Tanya Dennis in the above named case, hereby appeal to the United States Court of Appeal for the Ninth Circuit from the final SUMMARY JUDGMENT entered in this action on the 19th day of January 2011.

Tanya D. Dennis
Plaintiff Pro Se
13763 Campus Drive
Oakland, CA 94605

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TANYA D. DENNIS,

Plaintiff,

v.

WACHOVIA BANK, FSB, WELLS FARGO BANK,
N.A., AND DOES 1-5,

Defendants.

No. 10-01596 CW

ORDER GRANTING
MOTION FOR SUMMARY
JUDGMENT AND
DENYING PLAINTIFF'S
MOTIONS

This case involves the foreclosure of Plaintiff Tanya D. Dennis' residence by Defendant Wachovia Mortgage,¹ a division of Wells Fargo Bank, N.A. Defendant moves for summary judgment on all of Plaintiff's claims. Docket # 42. Plaintiff opposes the motion. Plaintiff has filed a motion for injunctive relief (docket # 44), an emergency motion for preliminary injunction (docket # 56), and a motion for leave to file in forma pauperis her petition for writ of mandamus to order this Court to rule on her motions for a preliminary injunction (docket # 71). The motions were taken under submission on the papers. Having considered all the papers filed by the parties, the Court grants Defendant's motion for summary

¹Defendant identifies itself as Wachovia Mortgage. The Court will assume that this is Defendant's correct name, rather than the name provided in the caption of Plaintiff's complaint, and that its motion applies to Wells Fargo Bank as well.

1 judgment and denies Plaintiff's motions.

2 BACKGROUND

3 The following facts are taken from the Court's Order Denying
4 Plaintiff's Motion for a Temporary Restraining Order and the
5 documents submitted by Plaintiff and Defendant.

6 In February, 2006, Plaintiff refinanced her home located at
7 2027 Woolsey Street, in Berkeley, California (the property) with a
8 \$406,000 loan (senior loan) from Wachovia Mortgage, which was then
9 known as World Savings Bank. Comp. ¶ 13. Repayment of the senior
10 loan was secured by a first deed of trust on the property. Id. On
11 October 16, 2006, Plaintiff obtained an equity line of credit
12 (ELOC) with a credit limit of \$25,000, also from Wachovia Mortgage.
13 Comp. ¶ 15. Repayment of the ELOC was secured by a second deed of
14 trust on the property. Id. The interest rate on the ELOC was
15 8.024%, and could go as high as 12.095%. Id. It is not clear when
16 but, at some point, Plaintiff stopped making payments on both
17 loans.

18 Plaintiff received a notice entitled Substitution of Trustee
19 dated December 16, 2009, substituting California Reconveyance
20 Corporation for Golden West Financial Savings as the trustee on the
21 deed of trust securing the ELOC. Comp. ¶ 17. Plaintiff received a
22 Notice of Default and Election to Sell, recorded on December 17,
23 2009, referring to the deed of trust securing the ELOC. Comp.
24 ¶ 18. Plaintiff received a notice of trustee's sale dated March
25 28, 2010 stating that her property would be sold on April 8, 2010.
26 Comp. ¶ 19.

27 On April 7, 2010, Plaintiff filed, in Alameda County Superior
28

1 Court, a motion for a temporary restraining order (TRO) to prevent
2 Defendant from foreclosing on her property. The state court
3 entered a TRO, setting April 21, 2010 as the hearing date on an
4 Order to Show Cause (OSC) regarding a preliminary injunction and
5 enjoining the sale until that date. On April 14, 2010, Defendant
6 removed Plaintiff's complaint to this Court. The state court TRO
7 expired by its own terms on April 21, 2010. According to
8 Defendant, the foreclosure sale on the deed of trust for the ELOC
9 was held on April 30, 2010 and, because there were no bidders, the
10 property reverted to Defendant. On May 3, 2010, Plaintiff filed a
11 motion for a TRO in this Court, which was denied on May 4, 2010.

12 In her complaint, Plaintiff includes allegations that
13 Defendant does not have standing or authority to foreclose on her
14 property because it does not have the original promissory note and
15 deed of trust.² She also alleges that Cal-Western lacks authority
16 to act as attorney-in-fact for Defendant because the substitution
17 of trustee form is invalid on its face, and that Defendant cannot
18 take possession of her property through foreclosure on the ELOC
19 without taking action on the senior loan. Comp. ¶ 41. In
20 addition, Plaintiff alleges that the foreclosure was improper
21 because Defendant securitized her loan without providing notice to
22 her or obtaining her approval. Comp. ¶¶ 54, 55. Finally,
23 Plaintiff alleges that the deeds of trust she signed contained

24
25 ²Plaintiff does not indicate whether she claims that Defendant
26 does not have the original documents for either loan or just for
27 the ELOC. Because Defendant foreclosed only on the deed of trust
28 securing repayment of the ELOC, the ELOC loan documents are the
only documents relevant to Plaintiff's claims.

1 several hidden and disguised provisions, creating a cognovit note,³
2 which deprived her of her property without due process. Comp.
3 ¶¶ 68-84. Because the loan documents contained cognovit clauses,
4 they were contracts of adhesion. Comp. ¶¶ 85-94.

5 Based on these allegations, Plaintiff asserts the following
6 causes of action: (1) breach of contract; (2) fraudulent
7 misrepresentation and failure to disclose; (3) quiet title;
8 (4) violation of the Racketeer Influenced and Corrupt Organization
9 (RICO) Act based on mail and wire fraud; and (5) a declaratory
10 judgment that the foreclosure sale of Plaintiff's property is void.
11 In her general allegations, Plaintiff makes passing reference to
12 the Truth in Lending Act (TILA) and the Fair Debt Collection
13 Practices Act (FDCPA). Defendant moves for summary judgment on any
14 potential claims under the TILA or FDCPA and Plaintiff does not
15 address Defendant's arguments or these statutes in her opposition
16 to Defendant's motion. Thus, any claims based on the TILA and
17 FDCPA are adjudicated in Defendant's favor.

18 LEGAL STANDARD

19 Summary judgment is properly granted when no genuine and
20 disputed issues of material fact remain, and when, viewing the
21 evidence most favorably to the non-moving party, the movant is
22 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
23 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
24 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.

25
26 ³A "cognovit note" contains provisions which attempt, in
27 advance of any legal controversy, to authorize the entering of
28 judgment without notice and hearing. Isbell v. County of Sonoma,
21 Cal. 3d 61, 76 (1978).

1 1987).

2 The moving party bears the burden of showing that there is no
3 material factual dispute. Therefore, the court must regard as true
4 the opposing party's evidence, if supported by affidavits or other
5 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
6 F.2d at 1289. The court must draw all reasonable inferences in
7 favor of the party against whom summary judgment is sought.
8 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
9 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
10 1551, 1558 (9th Cir. 1991).

11 Material facts which would preclude entry of summary judgment
12 are those which, under applicable substantive law, may affect the
13 outcome of the case. The substantive law will identify which facts
14 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
15 (1986).

16 Where the moving party does not bear the burden of proof on an
17 issue at trial, the moving party may discharge its burden of
18 production by either of two methods:

19 The moving party may produce evidence negating an
20 essential element of the nonmoving party's case, or,
21 after suitable discovery, the moving party may show that
22 the nonmoving party does not have enough evidence of an
23 essential element of its claim or defense to carry its
24 ultimate burden of persuasion at trial.

25 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
26 1099, 1106 (9th Cir. 2000).

27 If the moving party discharges its burden by showing an
28 absence of evidence to support an essential element of a claim or
defense, it is not required to produce evidence showing the absence

1 of a material fact on such issues, or to support its motion with
2 evidence negating the non-moving party's claim. Id.; see also
3 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
4 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
5 moving party shows an absence of evidence to support the non-moving
6 party's case, the burden then shifts to the non-moving party to
7 produce "specific evidence, through affidavits or admissible
8 discovery material, to show that the dispute exists." Bhan, 929
9 F.2d at 1409.

10 If the moving party discharges its burden by negating an
11 essential element of the non-moving party's claim or defense, it
12 must produce affirmative evidence of such negation. Nissan, 210
13 F.3d at 1105. If the moving party produces such evidence, the
14 burden then shifts to the non-moving party to produce specific
15 evidence to show that a dispute of material fact exists. Id.

16 If the moving party does not meet its initial burden of
17 production by either method, the non-moving party is under no
18 obligation to offer any evidence in support of its opposition. Id.
19 This is true even though the non-moving party bears the ultimate
20 burden of persuasion at trial. Id. at 1107.

21 DISCUSSION

22 I. Contract Claims

23 A. Breach of Contract

24 As Defendant points out, in her complaint and opposition to
25 the motion for summary judgment, Plaintiff does not indicate which
26 contract or contracts were breached or how Defendant breached these
27 contracts. In Plaintiff's first motion for preliminary injunction,
28

1 she clarifies that the breach was the improper transfer of her loan
2 documents, causing breaks in the chain of title, and the
3 securitization of the note. See Doc. # 44 at 12. However,
4 Plaintiff fails to identify a provision of a contract which would
5 be violated by these actions, or any other conduct by Defendant
6 that could be considered to be nonperformance of a contract. In
7 her complaint, Plaintiff also alleges that the loan documents are
8 void and unenforceable based on Defendant's non-disclosure of
9 cognovit clauses. Defendant's motion for summary adjudication on
10 the breach of contract claim is granted. See Reichert v. General
11 Ins. Co. of America, 68 Cal. 2d 822, 830 (1968) (elements of breach
12 of contract claim are a contract; plaintiff's performance or excuse
13 for nonperformance; defendant's breach; and resulting damages).

14 B. Unenforceable Contract

15 Under California law, "[i]f the court as a matter of law finds
16 the contract or any clause of the contract to have been
17 unconscionable at the time it was made the court may refuse to
18 enforce the contract, or it may enforce the remainder of the
19 contract without the unconscionable clause, or it may so limit the
20 application of any unconscionable clause as to avoid any
21 unconscionable result." Cal. Civ. Code § 1670.5(a).

22 Unconscionability has both a procedural and a substantive
23 component. Both components must be present before a court may
24 refuse to enforce a contract. Armendariz v. Found. Health
25 Psychcare Servs., 24 Cal. 4th 83, 114 (2000). However, they need
26 not be present to the same degree; "the more substantively
27 oppressive the contract term, the less evidence of procedural
28

1 unconscionability is required to come to the conclusion that the
2 term is unenforceable, and vice versa." Id.

3 The contract provisions Plaintiff cites in her complaint,
4 Comp. §§ 70-73, are not cognovit clauses or unconscionable.
5 Although Plaintiff cites them out of context, the provisions appear
6 to be typical for loan documents and provide, among other things,
7 that the borrower owns the property that is being used as security
8 for the loan, that there are no encumbrances on the property other
9 than those that are recorded, that the borrower will pay the loan
10 according to its terms, and, if the borrower does not, the property
11 may be sold at a trustee's sale. Accordingly, Plaintiff's claim
12 that the loan agreements are unenforceable or void is adjudicated
13 in favor of Defendant.

14 II. Misrepresentation and Failure to Disclose

15 Plaintiff claims that Defendant improperly failed to disclose
16 to her that, by signing the loan documents, she was waiving her
17 rights to ownership of her property. Comp. § 132. In her
18 opposition, Plaintiff elaborates that, had she known what the
19 cognovit phrases meant and the interest rate structure of the loan,
20 she would have never agreed to the loan.

21 Defendant argues that this claim is barred by the three-year
22 statute of limitations for fraud claims and that it is preempted by
23 the Home Owners' Loan Act (HOLA), 12 U.S.C. §§ 1461 et seq.

24 The elements of fraud under California law are as follows:
25 (1) a misrepresentation; (2) knowledge of the falsity; (3) intent
26 to defraud or to induce reliance; (4) justifiable reliance; and
27 (5) resulting damage. Seeger v. Odell, 18 Cal. 2d 409, 414 (1941);

1 Cal. Civ. Code § 1709. The misrepresentation element can be
2 demonstrated by a fraudulent concealment of facts. Outboard Marine
3 Corp. v. Superior Court, 52 Cal. App. 3d 30, 37 (1975). California
4 Code of Civil Procedure § 338(d) provides that an action for fraud
5 must be commenced within three years of the fraud, except that the
6 "cause of action of the case is not to be deemed to have accrued
7 until the discovery, by the aggrieved party, of the facts
8 constituting the fraud or mistake."

9 Under the HOLA, the Office of Thrift Supervision (OTS) has
10 authority to regulate federal savings associations. 12 U.S.C.
11 § 1463(a).⁴ Based on this authority, the OTS promulgated 12 C.F.R.
12 § 560.2, which provides:

13 OTS hereby occupies the entire field of lending
14 regulation for federal savings associations. OTS intends
15 to give federal savings associations maximum flexibility
16 to exercise their lending powers in accordance with a
17 uniform federal scheme of regulation. Accordingly,
federal savings associations may extend credit as
authorized under federal law, including this part,
without regard to state laws purporting to regulate or
otherwise affect their credit activities

18 Id. § 560.2(a).

19 Paragraph (b) of § 560.2 lists types of state laws that are
20 preempted under the HOLA and the OTS regulations. It provides that
21 state laws are preempted if they purport to impose requirements on
22 federal savings banks regarding the following: terms of credit,
23 including amortization of loans, the deferral and capitalization of

24
25 ⁴Because Plaintiff's loan was originated by World Savings
26 Bank, which was a federal savings bank subject to the HOLA and the
27 OTS regulations, the HOLA applies to her claims even though Wells
28 Fargo is a federally chartered bank not subject to the HOLA. Khan
v. World Sav. Bank, 2011 WL 90765, *3 (N.D. Cal.).

1 interest and adjustments to the interest rate (§ 560.2(b)(4));
2 loan-related fees, including late charges and servicing fees
3 (§ 560.2(b)(5)); disclosure and advertising, including laws
4 requiring specific content to be included on credit-related forms
5 and documents (§ 560.2(b)(9)); and processing, origination,
6 servicing, sale or purchase of, or investment or participation in,
7 mortgages (§ 560.2(b)(10)).

8 Paragraph (c) is a savings clause, which provides that state
9 laws, including tort laws, that "only incidentally affect the
10 lending operations of Federal savings associations" are not
11 preempted.

12 The OTS provides the following guidance on how to determine
13 whether section 560.2 preempts state laws:

14 When analyzing the status of state laws under § 560.2,
15 the first step will be to determine whether the type of
16 law in question is listed in paragraph (b). If so, the
17 analysis will end there; the law is preempted. If the
18 law is not covered by paragraph (b), the next question is
19 whether the law affects lending. If it does, then, in
20 accordance with paragraph (a), the presumption arises
that the law is preempted. This presumption can be
reversed only if the law can clearly be shown to fit
within the confines of paragraph (c). For these
purposes, paragraph (c) is intended to be interpreted
narrowly. Any doubt should be resolved in favor of
preemption.

21 OTS, Lending and Investment, Final Rule, 61 Fed. Reg. 50,951,
22 50,966-67 (Sep. 30, 1996).

23 Preemption under the HOLA extends to claims of fraud when they
24 are based upon lending practices addressed in § 560.2(b). Amaral
25 v. Wachovia Mortg. Corp., 692 F. Supp. 2d 1226, 1238 (E.D. Cal.
26 2010).

27 In her opposition, Plaintiff argues that she just discovered
28

1 the fraud last year. Plaintiff provides no other facts to support
2 this statement. The Court need not decide whether this claim is
3 timely because, as discussed below, it is preempted.

4 Plaintiff's only argument against preemption is that fraud is
5 a federal claim that cannot be preempted. However, as indicated
6 above, fraud is a common law state tort claim. Plaintiff's fraud
7 claim is based upon Defendant's concealing material facts about the
8 loan documents, interest rate and securitization. These
9 allegations fit squarely within §§ 560(2)(b)(4), (9), and (10).
10 Because Plaintiff's fraud claim bears on lending activities
11 contemplated by § 560.2(b), it is preempted. Defendant's motion
12 for summary adjudication of this claim on grounds of preemption is
13 granted.

14 III. Quiet Title

15 Plaintiff asks that title in the property be quieted in her
16 favor. To state a claim for quiet title under California law, a
17 plaintiff's complaint must contain: (1) a description of the
18 property; (2) the title of the plaintiff and its basis; (3) the
19 adverse claims to that title; (4) the date as of which the
20 determination is sought; and (5) a prayer for relief of quiet
21 title. Cal. Civ. Proc. Code § 761.020. In addition, a plaintiff
22 seeking to quiet title in the face of foreclosure must allege
23 tender of an offer of the amount borrowed. Mangindin v. Washington
24 Mut. Bank, 637 F. Supp. 2d 700, 712 (N.D. Cal. 2009); Arnolds Mgmt.
25 Corp. v. Eischen, 158 Cal. App. 3d 575, 578-79 (1984) (claim to set
26 aside trustee's sale must be accompanied by offer to pay full
27 amount of debt for which the property was security).

1 Defendant argues that the claim for quiet title fails because
2 Plaintiff has not alleged or argued that she can tender the amount
3 of the indebtedness. Plaintiff, without citing authority, responds
4 that she is not bound by the tender rule because the irregularities
5 in the trustee's sale means she owes nothing.

6 Plaintiff's argument that she is not bound by the tender rule
7 is incorrect. As explained in Arnolds Mgmt., "in the context of a
8 defaulting trustor's attack upon an irregular sale, . . . once the
9 trustor fails to effectively exercise his right to redeem, the sale
10 becomes valid and proper. A cause of action [regarding the]
11 irregular sale fails unless the trustor can allege and establish a
12 valid tender." 158 Cal. App. 3d at 578. Furthermore, to vest
13 title in a defaulting borrower without tender of the loan amount
14 would be inequitable to the lender because it would not only be
15 deprived of the money it loaned to the borrower, it would also be
16 deprived of title to the property it took as security for the loan.

17 Therefore, Plaintiff's claim for quiet title fails.
18 Defendant's motion for summary adjudication of this claim is
19 granted.

20 IV. RICO

21 To state a RICO claim, a plaintiff must allege that the
22 defendant (a) received income derived from a pattern of
23 racketeering activity and used the income to acquire or invest in
24 an enterprise engaged in interstate commerce; (b) acquired or
25 maintained an interest in, or control of, an enterprise engaged in
26 interstate commerce through a pattern of racketeering activity;
27 (c) while employed by an enterprise engaged interstate commerce,

1 caused that enterprise to conduct or participate in a pattern of
2 racketeering activity; or (d) conspired to engage in any of these
3 activities. Izenberg v. ETS Servs. LLC, 589 F. Supp. 2d 1193, 1201
4 (C.D. Cal. 2008). There are four essential elements to a RICO
5 claim: (1) a pattern of racketeering activity, (2) the existence of
6 an enterprise engaged in or affecting interstate or foreign
7 commerce, (3) a nexus between the pattern of racketeering activity
8 and the enterprise and (4) an injury to the plaintiff's business or
9 property by reason of the above. Sedima S.P.R.L. v. Imrex Company,
10 Inc. et al., 473 U.S. 479 (1985). An enterprise is any individual,
11 partnership, corporation, association, or other legal entity, or a
12 group of individuals associated in fact though not a legal entity.
13 Izenberg, 589 F. Supp. 2d at 1201. A pattern of racketeering
14 activity is a series of criminal acts defined by the statute,
15 consisting of the commission of at least two acts within a ten-year
16 period. Id. A plaintiff must also plead that the defendant's
17 violation was the but-for and proximate cause of a concrete
18 financial injury. Id.

19 In this cause of action, Plaintiff alleges that there is a
20 "civil enterprise -- consisting of the sponsor/issuer, the trustees
21 and the intermediary bank. These three parties work closely
22 together to effect the securitization transaction." Comp. ¶ 119.
23 The fraud consists of "misrepresentations of issues and facts
24 pertaining to the securitization transaction" and "the making of
25 false statements and or misleading representations about the value
26 of the collateral." Id. Plaintiff also alleges that "Defendants'
27 actions and use of multiple corporate entities, multiple parties,

1 and concerted and predetermined acts and conduct specifically
2 designed to defraud Plaintiff constitutes an 'enterprise,' with the
3 aim and objective of the enterprise being to perpetrate a fraud
4 upon the Plaintiff through the use of intentional nondisclosure,
5 material misrepresentation, and creation of fraudulent loan
6 documents." Comp. ¶ 121.

7 In her opposition, Plaintiff clarifies that the fraudulent act
8 upon which her RICO claim is based is the securitization of her
9 promissory note, which she claims occurred in January, 2007. Pl.'s
10 Aff. in Opp. ¶¶ 83, 85. However, the evidence submitted by
11 Plaintiff does not prove that the loan was securitized. Plaintiff
12 submits two "forensic audits." The first is an audit prepared by
13 Jarrell Davis of AMR Management Group (Docket # 60). Mr. Davis
14 states that the ELOC was securitized in January, 2007 to Fidelity
15 Select Biotechnology #316390772. However, no evidence is submitted
16 of this securitization. The second forensic audit was prepared by
17 Douglas Rian and Elizabeth Jacobson of Certified Forensic Loan
18 Auditors, LLC (Docket # 61). Mr. Rian and Ms. Jacobson found that
19 the ELOC was not securitized. See Rian and Jacobson Audit at 9
20 ("World Savings Bank did not sell its loans into securitization");
21 12 ("This loan was not Securitized."). Defendant submits a
22 declaration from its attorney, Christopher Carr, who states that
23 the original notes and deeds of trust are in his possession and
24 were never sold to third parties.

25 Although on a summary judgment motion disputes of fact are to
26 be resolved in favor of the non-moving party, here Plaintiff's own
27 evidence fails to prove her assertion that the ELOC was

1 securitized. Therefore, the Court resolves this dispute in favor
2 of Defendant. Furthermore, Plaintiff has not established that
3 securitization of the loan is a fraudulent act.

4 Thus, Plaintiff's RICO claims fails because the evidence
5 establishes that Defendant did not securitize her loan and, even if
6 it had done so, Plaintiff has not proved that the securitization of
7 her loan constitutes a pattern of racketeering. For these reasons,
8 Defendant's motion for summary adjudication of this claim is
9 granted.

10 V. Standing to Foreclose

11 Plaintiff implies that Defendant did not have standing to
12 foreclose because it did not possess the original loan documents.
13 As discussed above, Defendant states that its attorney is in
14 possession of the original loan documents. And, even if Defendant
15 did not possess the original documents, its standing to foreclose
16 would not be affected. As stated in the Court's June 4, 2010 Order
17 Denying Plaintiff's Application for a TRO, possession of the
18 original note does not affect the validity of a non-judicial
19 foreclosure sale. Rogue v. Suntrust Mortg., Inc., 2010 WL 546896,
20 *3 (N.D. Cal.) ("Uniformly among courts, production of the note is
21 not required to proceed in foreclosure and similarly no production
22 of any chain of ownership is required.").

23 Therefore, any claim that Defendant lacks standing to
24 foreclose is summarily adjudicated in favor of Defendant.

25 VI. Declaratory Relief

26 Plaintiff seeks a declaratory judgment determining the rights
27 of Plaintiff and Defendant "due to the controversy arising as it

1 relates to the genuine deed of trust, genuine promissory note, and
2 any and all subsequent documents, correspondence, and alike,
3 Plaintiff has detailed rights and duties and Defendants have
4 disputed these relative to the claims as presented herein." Comp.
5 ¶ 96.

6 The Declaratory Judgment Act (DJA) permits a federal court to
7 "declare the rights and other legal relations" of parties to a case
8 of actual controversy. 28 U.S.C. § 2201; Wickland Oil Terminals v.
9 Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986). The "actual
10 controversy" requirement of the DJA is the same as the "case or
11 controversy" requirement of Article III of the United States
12 Constitution. American States Ins. Co. v. Kearns, 15 F.3d 142, 143
13 (9th Cir. 1993). Under the DJA, a two-part test is necessary to
14 determine whether a declaratory judgment is appropriate. Principal
15 Life Insurance Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005).
16 First, the court must determine if there exists an actual case or
17 controversy within the court's jurisdiction. Id. Second, if so,
18 the court must decide whether to exercise its jurisdiction. Id.

19 Because all causes of action alleged by Plaintiff have been
20 adjudicated in favor of Defendant, no case or controversy exists
21 between the parties. Therefore, Defendant's motion for summary
22 adjudication of the claim for declaratory relief is granted.

23 CONCLUSION

24 For the foregoing reasons, Defendant's motion for summary
25 judgment is granted. Docket # 42. Plaintiff's motions for a
26 preliminary injunction (docket ## 44 and 56) must be denied because
27 she has not succeeded on the merits of her claims. See Rodeo

1 Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir.
2 1987) (party moving for preliminary injunction must demonstrate
3 either (1) probable success on the merits and the possibility of
4 irreparable harm, or (2) that there exist serious questions
5 regarding the merits and the balance of hardships tips sharply in
6 its favor). Plaintiff's motion to file in forma pauperis her
7 petition for writ of mandamus is denied as moot. Docket # 71.
8 Judgment shall enter in favor of Defendant. Both parties shall bear
9 their own costs of suit.

10
11 IT IS SO ORDERED.

12
13 Dated:1/19/2011



CLAUDIA WILKEN
United States District Judge